

EXHIBIT V

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : IAS PART 54

THE ESTATE OF YARON UNGAR, et al,
Plaintiff,

Index No.
102101/06

-against-

THE PALESTINIAN AUTHORITY, et al,
Defendant.

November 5, 2009
60 Centre Street
New York, New York

B E F O R E:

HON. SHIRLEY KORNREICH,

Justice

A P P E A R A N C E S:

JAROSLAWICZ & JAROS, LLC
Attorneys for Plaintiff
225 Broadway
New York, New York 10007

BY: ROBERT TOLCHIN, ESQ., of counsel
BRADLEY A. SACKS, ESQ., of counsel

MORRISON & FOERSTER LLP
Attorneys for Palestinian Pension Fund for State
Administrative Employees in the Gaza Strip
1290 Avenue of the Americas
New York, New York 10104

BY: CHARLES L. KERR, ESQ., of counsel
HAROLD J. McELHINNY, ESQ., of counsel
MARK DAVID MCPHERSON, ESQ., of counsel

LEE RUTHEN
Official Court Reporter

LEE RUTHEN - OFFICIAL COURT REPORTER

Proceedings

1
2 THE COURT: This is a motion in which
3 the plaintiffs are arguing that at trial the
4 burden of proof should be upon the defendants as
5 to who owns the property, and therefore the
6 defendants should go first and have to prove that
7 in fact they are the owners of the property, and
8 the plaintiffs then would go after.

9 The whole -- frankly, the whole burden
10 of proof and order of proof would be turned on
11 its head, according to plaintiffs.

12 Do you want to put your argument on the
13 record?

14 MR. TOLCHIN: Judge, for the declaratory
15 judgement action, as such out of the gate, the
16 usual concepts of who has the claim and who
17 has -- really who is the functional plaintiff and
18 who is the functional defendant is backwards, is
19 reversed.

20 In a declaratory judgement action, it is
21 really the party who might have been the
22 plaintiff who is the defendant.

23 THE COURT: Are you telling me that in a
24 declaratory judgement action, the order of proof
25 should be reversed in every case?

26 MR. TOLCHIN: I'm not talking about

Proceedings

every case, I'm talking about this case.

THE COURT: Have you found any declaratory judgement in which the order of proof was reversed?

MR. TOLCHIN: Judge, when you have a legal presumption, that's what we're starting with here, the assets at issue in this case are held in an account at Credit Suisse's subsidiary, and the title of that account is called Palestinian Pension Fund for State Administrative Employees of the Gaza Strip.

And out of mercy on the court reporter, I'm going to call that the PPF. That's the title of the account.

There is a presumption, a legal presumption which has been ruled on by many courts, and we cite in our papers, and I'll give a citation for one of them for the record.

We have a case called Karaha Bodas Company, a Second Circuit decision, 313 F3rd 70, which lays it out with a whole series of citations to New York State appellate decisions, that the funds in a bank account are presumed to belong to the person or entity whose name is on that account.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

THE COURT: Let me ask you something.

Is the declaration you are seeking that these funds belong to the PPA?

MR. TOLCHIN: No. The declaration that we're -- when this case began it had two defendants, one was the PPF and the other was the IPF.

THE COURT: The what?

MR. TOLCHIN: The Insurance and Pension Fund, which is something different. The gentlemen sitting at the table on the other side represent the Insurance and Pension Fund, which we acknowledge is a separate juridical entity. We don't dispute that it exists, it is a separate being.

Their overriding contention is that the money that is at Credit Suisse in an account titled PPF actually belongs to them, because they claim that they are sometimes known as the PPF.

It is like --

THE COURT: But your position is that the money at Credit Suisse belongs to Palestinian Authority, neither.

MR. TOLCHIN: At this case at the time the Palestinian Authority was named as a

Proceedings

defendant, but they defaulted, they are not here.

THE COURT: But what is your position?
Do you want me to declare that the money belongs
to the PPF?

MR. TOLCHIN: I want you to declare in
this case that we're going to try now that the
money does not belong to the IPF.

Once we remove the IPF from the picture,
the issue of whether the money belongs to the
Palestinian Authority and is reachable by the
Ungars is a separate issue the Court will have to
deal with, but not in this case because they are
not here in this case.

THE COURT: But the case won't be over.
You want the money to be declared belonging to
the Palestinian Authority.

MR. TOLCHIN: This case, after your
Honor will declare that the IPF does not have an
interest in these assets, this case, this index
number will be over.

We would have to at that point start a
turnover proceeding against the entity holding
the money.

THE COURT: Which is Credit Suisse,
which is what you've done, in a sense.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

MR. TOLCHIN: No, Credit Suisse is not part of this case. It is not part of this case. They are not in the caption, they are not here.

THE COURT: The caption only has the Palestinian Authority in it. The caption has the Estate of Yaron Ungar versus the Palestinian Authority.

MR. TOLCHIN: The Palestinian Authority never answered the complaint, they are in default and they are not here.

THE COURT: That's right.

MR. TOLCHIN: More than a year has passed, we can't force them to do anything in this case. We can't make -- they are not before the Court, they are not participating in this trial, they are not putting on evidence, and the relief that we requested as against the Palestinian Authority necessarily can't be heard or can't be granted here because they are not here.

The only party that did answer the complaint that is before the Court is the Insurance & Pension Fund, and the issue that -- the reason they were named as a defendant is because prior to the commencement of this

Proceedings

1
2 declaratory judgement, they had taken the
3 position that the money being held at Credit
4 Suisse, in the name of the PPF, actually belongs
5 to them, because they say they are also known as
6 the PPF, which is akin to me saying that money in
7 your Honor's bank account is actually mine
8 because I'm sometimes known as Shirley Kornreich.

9 THE COURT: Number one, first of all
10 they did not bring this action -- they didn't
11 bring themselves to court, they didn't bring you
12 to court, you brought them to court.

13 MR. TOLCHIN: Not exactly so. There was
14 a previous litigation, there was a previous
15 proceeding that was discontinued without
16 prejudice in favor of allowing this case to
17 proceed. And in the previous case they were
18 intervenors, they did come into that case.

19 THE COURT: And they were intervenors in
20 regard to the money you were trying to get out of
21 Credit Suisse.

22 MR. TOLCHIN: We had started a turnover
23 case against Credit Suisse and the Insurance &
24 Pension Fund intervened, saying we are also known
25 as the PPF, the money is really ours.

26 THE COURT: So to say that Credit Suisse

Proceedings

was never part of this case is an overstatement to some degree.

MR. TOLCHIN: But your Honor is not in a position right now --

THE COURT: I understand.

MR. TOLCHIN: You can't enter a judgement finding Credit Suisse --

THE COURT: I understand all of this. But it was the plaintiffs here who started all of these actions, who want the declaratory judgement.

I have done many cases where there are presumptions in favor of one party or another, and when there is a jury trial I tell the jury about the presumption, whether it is a defendant or a plaintiff, and the jury is told that it is a rebuttable presumption and is given instructions.

But never in any of those cases where presumption exists does the order of proof change, do burdens shift in the way that you are asking that burdens shift. I've never seen that happen.

MR. TOLCHIN: Consider this case as a practical matter. If there is a presumption, besides showing some proof that the money is --

Proceedings

or the assets are at Credit Suisse and titled to the PPF, once I show that, can't I rest and then the whole case becomes the defense case and the rebuttal case?

THE COURT: Maybe it does. I'm not giving you advice here, but I'm telling you, what you are asking is that they have to go first, they have to fulfill some burden.

I've never seen anything like this. You brought the case. It is your case to make out a prima facie case on.

MR. TOLCHIN: But the case law says, as cited in our papers, that the party that wants to challenge the presumption has the burden of proof.

It could be in previous cases with presumptions no one made this argument --

THE COURT: No one has ever made this argument.

MR. TOLCHIN: Or perhaps there are other issues, perhaps a whole case isn't decided by the presumption.

But they -- if I have the burden of proof of proving that they are not known as the PPF, that's a pretty difficult burden to meet.

Proceedings

1
2 It's logical to prove a negative, to prove
3 something is not true.

4 Go prove -- if your Honor were called on
5 to prove that I have never been called Bradley
6 Sacks --

7 THE COURT: What are you asking? From
8 what I understand -- what exactly are you asking?

9 It was my understanding that you are
10 asking that they go first, that they have the
11 burden of proof, that you need not do anything.

12 MR. TOLCHIN: They claim that they
13 are -- that this money, which is not titled to
14 them --

15 THE COURT: What are you asking for in
16 this order to show cause?

17 MR. TOLCHIN: That they should go first.
18 They have the burden of proof.

19 THE COURT: That's what I thought.

20 MR. TOLCHIN: That when we come here to
21 open, they go first.

22 THE COURT: Let me hear from the other
23 side.

24 MR. KERR: Your Honor, Charles Kerr,
25 Morrison & Foerster on behalf of the Pension
26 Fund.

Proceedings

Mr. Tolchin is just wrong on many fronts.

Clearly the plaintiff, who brought the action, who brought the declaratory relief, has the burden of proof, has to go first. That's clear law in New York. We've cited that in our papers.

In their complaint, your Honor, and I quote from paragraph 6 of their complaint, "Plaintiffs therefore bring this action for declaratory judgement establishing, adjudging and decreeing that the PA's New York stocks and bonds are the sole property of defendant PA, and that defendant, the Insurance & Pension Fund, has no rights to the PA's New York stocks and bonds."

They repeat that again, your Honor, in paragraph 76 through 79 --

MR. TOLCHIN: That's the relief we were seeking --

MR. KERR: Mr. Tolchin, please.

That's what they are seeking, that's what they are trying to do here.

We come in as a defendant. We denied that.

Mr. Tolchin keeps saying that we are

Proceedings

somehow not the same as the pension fund that operates and has operated for years, that's controlled this money, controlled this account.

We deny that. That's wrong. That's being made up. He has to prove that to be able to get the relief he wants in this case, your Honor.

He refers to a rebuttable presumption. What he is doing is mixing and matching the burden of proof, the burden of producing evidence to make a prima facie case to make out the elements of his complaint, and his obligation to meet the ultimate burden of persuasion with a burden of going forward on a specific issue.

If he comes in and makes his burden -- meets his burden of producing evidence to justify the rebuttable presumption that he is referring to, your Honor, he loses his case.

The account and what the title is is not to the Palestinian National Authority at all.

Mr. Tolchin says he can't come in here and make a claim against the Palestinian National Authority. He has to or he has no standing in this case. His only standing here is as a judgement creditor of the Palestinian National

Proceedings

Authority.

Your Honor, for 15 years we operated and controlled this account. The account is in our name, the sole signatories on the account are the Director General of the pension fund that I represent, the Chairman of the Board of the pension fund that I represent.

If he wants to come in and prove something different, it is his burden of proof, it is his order of proof.

Your Honor, he has made -- in reply papers I got last night -- one final thing, your Honor.

He said that the PA has not appeared, therefore they admitted what's in the complaint, and therefore the burden should shift to me.

That's wrong on many accounts.

There has been no default judgement entered against the PA. In a declaratory judgement such as this, you can't enter a default judgement against a party that has not appeared just on the pleadings. You have to come in -- plaintiff has to come in and actually prove their case.

Moreover, the case law is clear, you

Proceedings

can't enter a default judgement in a declaratory judgement action when that would affect another party who has in fact appeared, and I can cite you cases to that, your Honor, and I have them here if I can pass them up to you.

Those cases, Merchants Insurance Company versus Long Island Pet Cemetery, 616 NY2d 299 Third Department, Tower Insurance versus Kravtchouk, 2008 New York Misc. Lexis, 6880, New York Supreme Court, September 10, 2008.

Your Honor, the law -- we put this in our brief, your Honor -- the law is clear, plaintiff has their burden of proof, and that includes the burden of producing evidence to meet their prima facie case and the burden of ultimate persuasion of the claims they have brought in their complaint.

They are the ones that hauled us into court in this action. If there are issues in the case that the burden shifts on specific issues we'll deal with that, that's a different prospect and that's what he is referring to. But that's not the ultimate burden of proof, nor is it the order of proof, your Honor.

So again, I'll rest on my papers unless

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

the Court has other questions.

THE COURT: No.

Do you want to say something,
Mr. Tolchin?

MR. TOLCHIN: Yes.

What Mr. Kerr is referring to is quoted
to the Court from our complaint, is the relief we
were seeking against the PA. That was the other
defendant.

There were two substantive branches, two
prongs of the wherefore clause of the complaint.

There are four, but the last two were
such other and further relief as to costs and
expenses.

The two substantive points of the
wherefore clause of the complaint sought a
finding with respect to the PA, that was branch
A, and branch B was a finding with respect to the
IPF.

Now, Mr. Kerr is -- he is completely
wrong when he says that we have to prove
something vis-a-vis the PA in order to have
standing to prove something vis-a-vis the IPF.
It is not so at all.

We need to get these assets to enforce

Proceedings

1
2 our judgement. We have a problem, which is that
3 there is somebody else out there who claims it is
4 really their money.

5 So before we could be in a position to
6 get those assets turned over to us, we need to
7 deal with the other pretender to the money.

8 THE COURT: And you intend to do that
9 piecemeal.

10 MR. TOLCHIN: We intend to do that in
11 this declaratory judgement action, which will
12 determine whether the IPF has or has not --

13 THE COURT: What I'm trying to say when
14 I say piecemeal is the only way you are entitled
15 to this money is if it belongs to the PA, the
16 Palestinian Authority, so don't you have to prove
17 that?

18 You can't just come in here and say,
19 well, they are going to have to prove that they
20 own it first and then I'll deal with my reason
21 for being here, that the money really belongs to
22 the PA and I deserve to get it.

23 MR. TOLCHIN: When we brought turnover
24 proceedings against the holder of these assets
25 way back when, the only substantive opposition to
26 the turnover proceeding that was presented came

Proceedings

from the intervenor. The PA didn't challenge it, the PPF didn't challenge it.

THE COURT: The PA didn't challenge it because they don't believe the money belongs to them. The person who believes the money belongs to them is challenging your contention that it is the PA's money.

MR. TOLCHIN: He think your Honor has jumped -- is making some wild leaps to speculate about why the PA is challenging.

In fact, you could just as equally conclude they didn't challenge it, because they saw there was no merit to challenging it because it really is their money. It really is the PA's money.

The party that contended that the money belonged to them were the intervenors, the Insurance & Pension Fund, and we had at one point a turnover proceeding against the bank, which named the judgement debtor as a party, and had the Insurance & Pension Fund as an intervenor, and at the same time we had this declaratory judgement motion pending, and your Honor ruled that the turnover proceedings would be -- I forget if it was dismissed -- I don't know if it

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

was dismissed without prejudice or allowed to be discontinued without prejudice, I don't remember the fine distinction --

THE COURT: It went to Federal Court. I'm sorry, I'm mixing the two up.

MR. TOLCHIN: Your Honor, because we had the DJ action pending, we didn't need the turnover proceeding at that time, we would proceed to do discovery under the DJ action, and once we resolved the DJ action, the rest of the pieces would fall into place.

THE COURT: Let's use me again, just like you were using me.

You go to my bank, you say I'm attaching this money because it belongs to the Palestinian Authority under this judgement.

I come in as an intervenor and say no, the money belongs to me.

So if we go to trial, now I am going to have to prove that the money -- I have the burden to come forward and prove the money belongs to me? Is that what you are arguing?

MR. TOLCHIN: I go to your bank and --

THE COURT: And the money let's say --

MR. TOLCHIN: Is in an account called

Proceedings

what?

THE COURT: Let's say the account is in my maiden name, Shirley Werner, I am Shirley Werner Kornreich now.

MR. TOLCHIN: The account is in the name of Shirley Werner, and I come in with a judgement against the Palestinian Authority and say Shirley Werner is really the Palestinian Authority.

Is there any order from a court or an injunction or anything like that telling -- just for the judgement against the PA, the bank isn't going to freeze Shirley Werner's account.

THE COURT: That's not my question. My question is let's say it goes to trial. Am I the one with the burden of proof?

Am I the one who has to go forward and show that Shirley Werner Kornreich is really Shirley Werner, or that we are one and the same, and that you have no obligation to come forward first with a prima facie case?

MR. TOLCHIN: If somebody wants the money, they have to prove that they are entitled to it.

THE COURT: I understand.

MR. TOLCHIN: If Shirley Werner would

Proceedings

1
2 come in and say here is my ID, I'm Shirley
3 Werner, presumptively it would be her money.

4 And somebody else who says they want it
5 would have to prove, no, no that's a pseudonym,
6 or for some reason to rebut the presumption that
7 the money in the account belongs to the title of
8 the account.

9 MR. KERR: Your Honor, they want the
10 money, they brought the action, they have the
11 burden of proof.

12 MR. TOLCHIN: What we want -- what we
13 need to do -- we have two different -- withdrawn.

14 We have money that is titled in the name
15 of the PPF, and we feel we can prove it.

16 When it comes to getting turnover of the
17 money, we're not worried about being able to
18 prove that the PPF is part and parcel of the PA.

19 We say that the Insurance & Pension
20 Fund, which is an independent entity, has no
21 stake in that fund. They don't care.

22 If they are -- if they are -- if we
23 resolve this proceeding with a declaratory
24 judgement saying that the Insurance & Pension
25 Fund does not have a stake in this money, that
26 they don't own this money, then they don't have a

Proceedings

horse in the race.

THE COURT: But they wouldn't be here were it not for you.

MR. TOLCHIN: No. They came here --

THE COURT: Because you were trying to seize this money that they claim is theirs.

MR. TOLCHIN: Right.

Let's go back to that.

The Palestinian Authority, and whatever the PPF did, put up no resistance at all when we tried to get this turnover of the money.

It was on notice to them, they were well served, they had counsel in the United States, they didn't --

THE COURT: Wait a minute.

You are saying that the PPF and the Palestinian Authority -- they are saying they are the PPF. So what you are doing is putting the Palestinian Authority and the PPF in the same box, but they are saying no, we're the PPF.

MR. TOLCHIN: They are saying they are also known as the PPF. Over the years they were known by lots of different names, and we say that's not so.

THE COURT: Right. And you are saying

Proceedings

also that you are really the -- that the money really belongs to the Palestinian Authority.

MR. TOLCHIN: Your Honor, if they are adjudged -- if the IPF is adjudged not to be -- not to have any interest in these assets, then they leave, they go back to Gaza.

THE COURT: And you then -- you then bifurcate this whole proceeding and say the money really belongs to the PA, they've defaulted, it is out.

But it seems to me -- it seems to me that the only standing you have here is if the money belongs to the PA.

MR. TOLCHIN: It is not a question of standing.

THE COURT: Why else do you have a right to be --

MR. TOLCHIN: I have a judgement against the PA. I'm entitled to enforce it against any assets that belong to the PA.

We have an issue here where there is assets that we believe belong to the PA and somebody else says no, no, they belong to us. So we have to deal with this claim about whether the assets belong to the PA or not.

Proceedings

1
2 THE COURT: Mr. Tolchin, I think at this
3 point I've read your papers and I've allowed both
4 sides to argue.

5 I am denying your request. I believe
6 that this is a case in which the plaintiffs are
7 claiming that the money belongs to the judgement
8 debtor, the Palestinian Authority or the PLO, but
9 I think in this case you are claiming the PA,
10 maybe it is the PLO who you are claiming, and
11 there is an intervenor who says no, the money is
12 ours.

13 I believe it is up to you to prove that
14 the money belongs to the PA and then they can
15 come in. You have the initial burden in this
16 case. I see no reason to reverse the normal
17 course.

18 If there is a presumption that's to be
19 charged to the jury, if there is a jury, because
20 then again it is a declaratory judgement action,
21 and I believe that is at the Appellate Division
22 now, if there is a presumption to be charged I'll
23 charge it, and if it's going to be a court trial
24 the Court will take -- will heed that presumption
25 and require some kind of rebuttal or there will
26 -- the burden will be there.

Proceedings

1
2 But it is not going to be a reversal of
3 the order of proof and taking the prima facie
4 case away from the plaintiff. I just don't
5 believe that's the way it should work.

6 So I'm denying that, and this is my
7 order on the record.

8 MR. TOLCHIN: Is there going to be a
9 written order?

10 THE COURT: This is my order. I'm just
11 going to write a gray sheet that the motion is
12 denied in accordance with my decision on the
13 record, argument of counsel, and the papers
14 submitted by the defense -- by the defendants. I
15 think they are right.

16 There apparently is also a pretrial
17 hearing today. We're trying to work out the in
18 limine motions and certain thorny issues with
19 regard to -- apparently there are witnesses who
20 are in Gaza and are having difficulty getting
21 visas, there is supposed to be some depositions,
22 last minute depositions that you're having
23 difficulty with.

24 Is that still the case?

25 MR. KERR: It is, your Honor.

26 Again just so I'm clear, your Honor, we

Proceedings

1
2 had submitted a preconference statement --

3 THE COURT: I have it.

4 MR. KERR: Your Honor, we're prepared to
5 proceed, but if you are not today --

6 THE COURT: I've seen your preconference
7 statements and there are a lot of issues.

8 MR. KERR: There are a lot of issues,
9 your Honor. Actually, I have an agenda and I've
10 highlighted those issues if you'd like me to pass
11 it up.

12 THE COURT: Has opposing counsel gotten
13 that?

14 MR. TOLCHIN: Judge, I find the agendas
15 and preconference statements on the one hand to
16 be helpful, but on the other hand it bothers me
17 when they are submitted to the Court the night
18 before without input.

19 I think it would be much more helpful if
20 the week before the conference I got it and then
21 I could put in my two cents.

22 That preconference submission, frankly,
23 we were joking about it because it reads more
24 like a motion.

25 THE COURT: There are parts of it that
26 don't read like a motion, the parts dealing with

Proceedings

the depositions that are difficult to take
because --

MR. TOLCHIN: Which were never really
discussed between the parties before that was
admitted.

THE COURT: I'd like it hear if that's
the truth. That doesn't seem like something we
need legal input about, it is rather a trial
issue in terms of trying to help both of you, or
there are issues --

MR. TOLCHIN: I think going forward when
we have these conferences, if one party or the
other wants to submit an agenda to the Court, I
think it should be on some kind of meaningful
notice to the other side.

THE COURT: Absolutely. I think there
absolutely should be, but just going forward now,
and from now on that should happen.

But in terms of the fact that there are
witnesses, according to this, who are in the Gaza
Strip and can't obtain visas to come here --

MR. TOLCHIN: I have no way to verify
that. On the one hand I could say I don't know
why these witnesses were not deposed during
discovery. It is fairly shocking that the

Proceedings

defendant's expert, who has put in affidavits in the past in this case, he is one of the witnesses that they want to have appear by remote control.

MR. KERR: Your Honor, if I may layout what's going on here, because Mr. Tolchin frankly is incorrect. Let me tell what you we've done.

When we were here before you on June 25 you asked us to exchange a witness list for trial. We did that. Plaintiff listed four witnesses, we listed more than that, we listed a number of them, we listed fact witnesses, both here in the United States, fact witnesses in the Middle East, we identified our expert witnesses that we've previously disclosed to plaintiff.

Some of those witnesses -- I think there are four -- live and reside in the Gaza Strip. When we were here in June we told your Honor we are working to try to make sure they will be able to come to trial.

It is a difficult process. One, we have to get permission to have them come out of the Gaza, go to the consulates and they apply for visas, and they have to get the visas. That process is going on, but we are still not there yet.

Proceedings

1
2 THE COURT: The one aspect that just
3 jumped off the page is Farouk A-Franji. The
4 reason -- because I had read the previous motion
5 papers, and he seems to have been in 1998 and
6 1999 the past president of whatever pension fund
7 was going on, according to all these minutes. So
8 it would -- perhaps he would be a very important
9 witness.

10 MR. KERR: Your Honor, Mr. A-Franji is
11 the current Director General of the pension fund,
12 which is the head administrator, he runs the
13 entire pension fund. He has run the pension fund
14 since 1998. He is one of our principal client
15 contacts.

16 He was actually deposed by the plaintiff
17 in this case. We were able several years ago,
18 before some of the current restrictions, had him
19 come to the United States, at their request, come
20 to New York. He was deposed for two hours.

21 THE COURT: So there is a deposition.

22 MR. TOLCHIN: And at the end of the
23 deposition, when I was done, as I always do, I
24 said, "Mr. Kerr, any questions?" And he said,
25 "No."

26 MR. KERR: Your Honor, it is our

Proceedings

witness. If we're going to bring forward a witness to trial, we had no reason to think we couldn't do it.

We do want to do that, we want to bring him here for trial.

THE COURT: This has nothing at all to do specifically with this.

It was curious to me when I read -- as I said, there are a lot of addenda to the plaintiff's motions, and it was interesting when I was reading this, it seems that in '96, '97, '98, there were minutes, and there should have been financial statements and audits.

MR. KERR: There are, your Honor.

THE COURT: And turned over?

MR. KERR: All turned over, your Honor.

Those financial records and audits all refer to this fund belonging to the pension fund.

MR. TOLCHIN: Not true. That starts curiously in 2004 --

THE COURT: I was just curious if all of this was turned over. That's all I wanted to know.

MR. KERR: We have financial records. If you look --

Proceedings

1
2 MR. TOLCHIN: They object to the
3 authenticity of those documents, by the way.

4 THE COURT: Believe me, I don't want to
5 open a Pandora's box. I was just curious reading
6 these different minutes.

7 It seemed to me there should be a lot of
8 statements, audited statements, that Mr. A-Franji
9 was involved in a lot of this.

10 MR. KERR: And there are, your Honor.
11 If you look at the minutes, there is discussion
12 in the minutes about these very assets that they
13 are managing.

14 Mr. A-Franji, in the minutes, comes to
15 the United States to meet with the investment
16 managers, to meet with them, and he goes back and
17 reports to the board.

18 That's all in the minutes, your Honor.
19 We produced all of those records so I have no
20 problem with that whatsoever.

21 Our issue is that we have witnesses that
22 applied visas, visas have not come through yet,
23 and we're working very hard. We've been in touch
24 with the State Department to try to accomplish
25 that, but it is not an easy process.

26 We have other issues. When we were here

Proceedings

1
2 last time, one of our other witnesses, who is the
3 Chairman of our board, is Dr. Salam Fayyad.
4 Dr. Fayyad has been Chairman of our board since
5 2002. He is also currently the Prime Minister of
6 the Palestine.

7 MR. TOLCHIN: Of the Palestinian
8 Authority, not Palestine. In this case it was
9 judged not to be a sovereign government.

10 MR. KERR: The reason for that, your
11 Honor, is under the statute there is ex officio
12 members that are members of our board, as well.
13 That's been true for 40 years.

14 So one of the other issues we have
15 raised in our conference when we were here
16 before, we talked about the fact that we would
17 need to do an examination in the Middle East, and
18 that was agreed to at the time.

19 THE COURT: That's what I was a little
20 confused about. Has Mr. Tolchin agreed to that?
21 That's what it sounds like from this.

22 MR. KERR: We agreed to it last time we
23 were here.

24 THE COURT: You also say it is going to
25 take place in Ramallah and Mr. Tolchin has to
26 agree to this?

Proceedings

MR. KERR: To be fair, Mr. Tolchin has not agreed to that.

MR. TOLCHIN: I agreed to do it in Jerusalem, East Jerusalem, the same hotel where Mr. Kalbian produced a minister from the Palestine Monetary Authority, to do it at any other place in East Jerusalem but -- I can get into it, and maybe your Honor would want to see it on papers, but Ramallah is off limits for multiple reasons.

MR. KERR: Your Honor, if I may, Dr. Fayyad is the current head of the government, a government that's governing the Palestinians board that's being recognized by our board. He lives and works and operates in Ramallah.

THE COURT: But we'd make concessions. If Mr. Tolchin is making a concession that he agrees he should not be forced to come here, he is also asking that it not take place in Ramallah. I know that's been his position about a lot of witnesses and a lot of depositions.

MR. KERR: It may well be a lot of witnesses and other matters. We're talking about the Chairman of our board and the current head of the government.

Proceedings

With all due respect, your Honor, I think it would be inappropriate for the Court, with due respect, to direct the head of another government to have to not be examined where he lives and works.

Mr. Tolchin --

THE COURT: One at a time. Nothing is getting taken down.

MR. KERR: Our position is, your Honor, that that examination should happen in Ramallah.

THE COURT: What if I ordered him to be here for trial or forget it?

Would you then compromise and say he can leave Ramallah and do it in Jerusalem?

MR. KERR: I don't know that, your Honor. But I will say this. I don't know that.

THE COURT: In here you say, quote, "The Court should supervise the deposition of Mr. Fayyad in person."

In person in Ramallah? Or by video conference? Frankly, I'm not going to Ramallah and I certainly can't act as a Supreme Court Justice in Ramallah.

MR. KERR: Your Honor, let me tell you exactly why we made that suggestion.

Proceedings

We think that this examination should be Dr. Fayyad's examination at trial. We think from our point of view it would be short and simple, and any cross-examination -- it is not fact deposition. Any cross-examination should be limited to the direct-examination. And I want to make sure that happens and happens correctly.

I think that does -- that examination does need to be supervised by an appropriate judicial officer. We proposed having your Honor do it, or we could have a Referee --

THE COURT: Supreme Court of New York can't be in Ramallah. I don't think I have any jurisdiction in Ramallah.

Are you suggesting I go to Ramallah?

MR. KERR: Yes, your Honor, I was in Ramallah three weeks ago.

THE COURT: But you weren't acting as a New York Supreme Court justice.

MR. KERR: I was not doing that, your Honor, that's for sure. One second.

Your Honor, I think we cite in our preconference statement other cases where similar type procedure has been done, where there has been a head of a government, they go to where the

Proceedings

head of the government is to do the examination.

THE COURT: When you suggest video conference, perhaps, that might be another option for me, but I do not see myself going to Ramallah to oversee a deposition.

MR. KERR: We can set it up by video conference. We feel it is important to have your Honor supervise this examination for obvious reasons.

THE COURT: But I also don't see forcing Mr. Tolchin to go to Ramallah either when I am sure that Mr. -- Dr. Fayyad has been to Jerusalem, East Jerusalem, in the past, and it is not a burden for him to go to East Jerusalem.

It may well be a burden or perhaps a security risk for Mr. Tolchin to go to Ramallah.

MR. KERR: Your Honor, our point, though, is that to require the head of another government to go to someplace else other than where he lives and works, again, with all due respect to the Court, is not appropriate, and other courts have not done that, other courts have respected that.

The Palestinian Authority and Dr. Fayyad is recognized by our State Department to be head

Proceedings

of the government in the Palestinian territories.

THE COURT: But you are the one that wants him to testify. The other side is not subpoenaing him. You are the one that wants to put his testimony in.

And he is not testifying as the head of the Palestinian Authority, rather, he is testifying as -- from his position at PIF or -- as the Chairman of the Board.

MR. TOLCHIN: Let's be fair, Judge.

As the head of the Palestinian Authority, He is the head of the judgement debtor.

We're talking about cutting the guy slack and giving him all sorts of extra privileges that other witnesses don't get.

He owes my client a hundred million dollars, which has been adjudged by courts of the United States and affirmed up to the Supreme Court that didn't take cert. We're going to give him special privileges?

If he would authorize a check to be written this case would be over.

THE COURT: Mr. Tolchin, you agreed last time apparently to a process where Dr. Fayyad

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

would testify in East Jerusalem, apparently, or something like that.

MR. KERR: To be fair, your Honor, what the discussion was was that Dr. Fayyad will testify by examination prior to trial.

THE COURT: By examination --

MR. KERR: By examination prior to trial for use at trial. That's what we discussed before. I will be very fair about that.

He is a crucial witness, he is the Chairman of the Board, he is one of the two signatories on this account because of his role as Chairman of the Board.

THE COURT: So why is it such a problem for him to travel to East Jerusalem, a place he travels to and has traveled to in the past?

MR. TOLCHIN: His children go to school in Jerusalem.

MR. KERR: Because, your Honor, he is the head of the government. He is who he is. He wears both hats, I recognize that, and we feel it is important and appropriate, out of due respect for that, that he be examined in the location where his offices are and where he lives.

THE COURT: The Court is ruling right

Proceedings

now, if this is going to take place you can either accommodate the plaintiffs or not present him.

That's my ruling. He can travel to East Jerusalem, something that does not seem at all burdensome to him, or he cannot testify.

MR. KERR: Let me move on to some other issues, your Honor.

We have two other witnesses we talked about, Jacques Neriah and Freih Medeain. Those are two fact witnesses that -- plaintiff identified Mr. Neriah the day before the close of discovery, we then responded with Mr. Medeain.

Our proposal is if they are brought to trial, we've identified Mr. Medeain as a witness, they have identified Mr. Neriah. If they are brought to trial we can depose them right prior to trial. If they want to bring Neriah here beforehand we can depose him, but otherwise we do it right before the trial.

THE COURT: Mr. Medeain, from what I understand, is also having visa problems.

MR. KERR: He is. He is not in the Gaza, your Honor, but he has applied for a visa. He has been waiting quite a long time.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

And, again, we've been working with the State Department trying to get that resolved. That has not been resolved yet and that's part of the problem.

Going back to some evidentiary issues, some document issues, your Honor.

Last time in June you asked us to exchange besides witness lists exhibits. We did that. We went through -- we submitted our list of exhibits on October 16. Plaintiff gave us their list on October 23.

We've gone through their list. We've identified a number of documents that, assuming they bring a witness in to lay a foundation, we won't object to.

We've given them that list, they have not done that for us.

MR. TOLCHIN: Judge, could we clarify that? What we got was a list of exhibits that they have not objected to. That's what they wrote me, that's what I thought I read in the e-mail.

Now Mr. Kerr is saying that the exhibits that he is stipulating to he is actually not stipulating to, and he will only stipulate to

Proceedings

1
2 them if we bring in a witness to lay a
3 foundation.

4 THE COURT: We're jumping the gun
5 because from what I understand, he is asking why
6 you have not responded to his exhibit list.

7 MR. TOLCHIN: We just got it.

8 MR. KERR: They got a list three weeks
9 ago.

10 Let me tell you exactly what happened,
11 your Honor.

12 We gave them a list three weeks ago, we
13 listed all of our exhibits, and for some of the
14 exhibits we had multiple copies. We identified
15 multiple Bates numbers. We told them that we're
16 going to go through and make sure which Bates
17 numbers from which documents will be used.

18 We sent them a revised one several days
19 ago, but we did not add any new exhibits, they
20 are the same documents that are on the list on
21 October 16. We've gotten no response from them.
22 So that's one thing.

23 Your Honor also asked the parties to try
24 to come up with stipulated undisputed facts.

25 We sent them our proposed undisputed
26 facts. They have not responded.

Proceedings

So there is a number of things, your Honor, that we've been trying to do but are still ahead of us that we have to accomplish.

Other items -- let me quickly list the other items I had noted in our preconference statement, your Honor.

As I mentioned, we have these other witnesses that have visa issues, Mr. A-Franji, our experts, Sharhabeel Al-Eaeen, and two other witnesses in the Gaza who are pensioners, Mr. and Mrs. El Khateeb. We don't have visas for them yet, we're working on this, but we're not there yet.

In addition, in our pretrial -- preconference statement, your Honor, we proposed a schedule for dealing with motions in limine. We anticipate a number of motions in limine here.

What we propose, your Honor, is that assuming the trial date stays where it is, and we'll talk about that in a second, that whatever the trial date is the motions be made eight weeks in advance, responsive papers be provided three weeks in advance, and then we set up a schedule to address those before trial.

Your Honor has already indicated that

Proceedings

1
2 you are going to have to deal with any exhibits
3 for which there are objections, and there are
4 many. Each side gave a list of potential trial
5 exhibits, several hundred documents, and again,
6 assuming they don't just say ours are fine, we
7 have a number of issues there.

8 THE COURT: And you will have
9 spreadsheets in regard to each document.

10 MR. KERR: We do, your Honor.

11 THE COURT: So we can use the
12 spreadsheets to make any rulings.

13 MR. KERR: We can.

14 THE COURT: On those spreadsheets just
15 mark the ones that are disputed.

16 MR. KERR: We can do that, your Honor.

17 THE COURT: Both sides. So that has to
18 be done.

19 There was a simple issue, the
20 interpreter for trial, or interpreters.

21 If the parties agree on one and are
22 willing to pay one outside of the court system,
23 that's fine. Otherwise we would use the one from
24 the court system.

25 MR. TOLCHIN: I believe that the
26 individuals that we actually do agree on, Mr.

Proceedings

Marwan Abdel-Rahman. I believe he works through the court system.

He was actually -- before you hired him, I didn't realize this, he was actually the interpreter at the original hearing on the Monetary Authority case.

Then he showed up -- he was their interpreter at a deposition in the case, and we've hired him for other things. He is qualified.

THE COURT: So we will try to arrange to have him here if he works for the court system.

Will we need a Hebrew interpreter, as well?

MR. KERR: Not for us, your Honor.

MR. TOLCHIN: I don't think so. I'm pretty sure not, but I'm actually aware of somebody of similar quality who belongs to the court system who in fact comes up.

MR. KERR: I don't think that will be an issue.

THE COURT: All right.

MR. KERR: We have the -- we have a question of timing, and Mr. Tolchin raised with me this morning the issue about the fact we don't

Proceedings

1
2 have a decision from the Appellate Division on
3 the jury issue yet.

4 He has indicated -- and I'll let
5 Mr. Tolchin speak for himself -- that if,
6 depending on how the burden of proof issue came
7 out, I think he intends to address that.

8 He raised with us, he proposed to us
9 that we agree that he is going to take that issue
10 up, we do it in an expedited basis, but that the
11 trial be put over pending the resolution of that
12 appeal.

13 We've told him that -- with all due
14 respect, your Honor, I recognize the jury issue
15 is fundamental to the trial, I think plaintiff's
16 burden of proof issue is, as well, so I respect
17 that, your Honor.

18 MR. TOLCHIN: We had discussed this
19 morning that no matter how the burden of proof
20 issue turned out today, whichever of us won --
21 whichever of us lost the issue was planning to
22 appeal it.

23 So we had discussed amongst ourselves
24 whichever party lost would appeal and file -- and
25 would agree to file the appeal promptly, we said
26 to be filed within 30 days of the order, meaning

1 Proceedings

2 to file the brief, not just to file an order to
3 appeal.

4 THE COURT: It would be expedited.

5 MR. TOLCHIN: Right. We could
6 theoretically file a notice of appeal and then
7 wait nine months to perfect an appeal.

8 THE COURT: But you would try to
9 expedite it.

10 MR. TOLCHIN: We would file -- when Chet
11 and I discussed it this morning we didn't know
12 who was going to win. Now it falls on me, so we
13 would file that appeal within 30 days of the
14 order.

15 THE COURT: The other thing that caught
16 my eye is, do you both agree there is an issue as
17 to choice of law?

18 MR. TOLCHIN: I don't think there is an
19 issue.

20 MR. KERR: We do, your Honor. Let me
21 explain what it is. It has to do with where
22 these assets are held.

23 The assets that they are trying to
24 obtain when they brought this action were held in
25 a sub-custodial account at an entity called Swiss
26 American Securities, Inc.

Proceedings

THE COURT: In New York.

MR. KERR: In New York.

However, that entity is a sub-custodian for Credit Suisse because these assets were originally in the -- these funds to purchase these assets were deposited in Credit Suisse in Zurich under a global custody contract.

The global custody contract that's in place as of the date they became judgement creditors and brought their action is between -- I have copies of it here, it is on their exhibit list, it is on our exhibit list -- between the Palestinian Pension Function for the State Administrative Employees and Credit Suisse Asset Management.

THE COURT: And the original entity you named is the entity you've been referring to as the PIF, am I correct?

MR. KERR: No, PPF.

THE COURT: PPF.

MR. KERR: Your Honor, that's us.

That's us.

He disagrees, that's us, but -- so in their papers, your Honor, what they said was this. This is on their papers on the burden of

Proceedings

proof.

They said, "In the instant case, the possessor and presumptive owner of the assets is the entity to which the securities are titled and which has signatory power over the account holding the securities." That's what they described as the basis of this presumption.

The account, as I said, that's who it is titled to, the signatories on the account is the Director General of our client, the pension fund, and Chairman of the Board of our pension fund.

That custody agreement is subject to Swiss law, and we believe there is potentially a question of control over that based on Swiss law, and we believe that the ultimate ownership question is a question of Palestinian law, because that is whether our entity actually owns those assets.

So we are prepared, and we already told plaintiff this, to put forward expert testimony on Palestinian law, which we've done long before, and on Swiss law on those issues.

Those are the issues --

THE COURT: That's what's confusing in terms of -- I just throw this out -- in terms of

Proceedings

ownership of the assets and the law, if you are going to ask for Palestinian law.

It seems to me from living with this case that there is a very long history to these funds. The funds originally were in Egypt and then they were not turned over or were turned over, I'm not sure, am I correct?

And they eventually went to Israel, Israel was collecting all of this money, and then turned over the funds to I believe the PA

MR. TOLCHIN: Correct.

THE COURT: And then -- or whoever was going -- well, it wasn't the PA per se, it was whoever was going to take care of these funds for the workers.

These were funds that were supposed -- these were for workers who -- pension funds. So the Israeli authorities turned the funds over.

I don't know if the funds collected by the Egyptians ever were turned over or disappeared, but then -- so the funds were in Israel, then they were apparently in Palestine, or the Palestinian Authority, I should say, and then transferred somewhere else, be it Switzerland or the United States.

Proceedings

MR. TOLCHIN: They were never actually in the Palestinian Authority.

THE COURT: Where were they?

MR. TOLCHIN: They came from Israel. I maybe skipping a step, but no step ever brought it to a bank in the Palestinian Authority. It went from an Israeli bank to Morgan Stanley.

THE COURT: They were wired to Morgan Stanley, I assume.

MR. TOLCHIN: They came from Israel to Morgan Stanley.

THE COURT: Here in New York?

MR. TOLCHIN: Yes.

THE COURT: And the rest is now in New York.

MR. KERR: Your Honor, again, there is a long complicated history to the discovery.

But the issue to be tried here is actually narrowing. The issue to be tried is who owned and controlled the assets at the point in time they became judgement creditors, because that's the only point where they have any interest or standing in this whatsoever.

THE COURT: You mean your claim is that whoever claimed to own it at that point, no

Proceedings

1
2 matter if they stole it, no matter if someone
3 else owned it the day before, that's all that
4 matters?

5 MR. KERR: Your Honor, I think we see
6 the issue is that's the ultimate question to be
7 done.

8 There are evidentiary questions, yes,
9 but the question is when they became judgement
10 creditors, and they said, okay, now we have an
11 interest in what we claim to be the PA's assets,
12 who owned it at that time?

13 Prior to that they had absolutely no
14 interest in these assets whatsoever.

15 THE COURT: But who had control of these
16 assets previously, historically, at least the
17 very least is some evidence of who owned it on
18 the date in question.

19 MR. KERR: There may be evidentiary
20 issues there, your Honor. I'm not sure I agree
21 with that.

22 But I will say this. The question here,
23 the question for the ultimate finder of fact is
24 when they became a judgement creditor, who owned
25 and controlled those assets at that point and up
26 until today.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Proceedings

And at that point, your Honor, what the assets were in was under a global custody contract between Credit Suisse and the Palestinian Pension Fund for the State Administrative Employees.

The only signatories on that account was our Director General and the Chairman of our board. We have in fact had control and moved those monies around for years. That's the issue to be decided.

They may want to come in and argue that the history and the past tells -- gives some idea about how to resolve that issue, but that's the issue on which they have standing, that's the issue that they have brought, that's what their complaint is.

MR. TOLCHIN: A little bit of a problem with that.

MR. KERR: One other thing, your Honor.

For example, who owned your house five years ago is or is not automatically relevant to who owns it today.

MR. TOLCHIN: This is a hundred percent relevant, Judge.

MR. KERR: Mr. Tolchin, please.

Proceedings

1
2 If they are a judgement creditor and
3 they go in and try to attach the house, the issue
4 is who owns that house today.

5 They will make arguments that who owned
6 it in the past is relevant, whatever, but the
7 issue in this case that has to be decided
8 ultimately is who owned it when they became
9 judgement creditors, and therefore that's the
10 first time we have any standing or right or claim
11 to those assets.

12 THE COURT: That's why you have title
13 searches, perhaps.

14 Anyway, what did you want to say?

15 MR. TOLCHIN: First of all, I disagree
16 with the characterization of what's the issue in
17 the case.

18 It is not -- if the IPF is an
19 independent entity that has no stake to these
20 monies, these assets, then the IPF does not care,
21 should not care who owns these assets and when.
22 Their only interest is whether they own it. The
23 rest is none of their business, frankly.

24 The fact that Mr. Kerr keeps repeating
25 that his Chairman of the Board -- that the IPF's
26 Chairman of the Board may have been a signatory

Proceedings

1
2 with respect to these funds, that's a bit
3 disingenuous to bring up, because we know that
4 the Chairman of the Board of the IPF is somebody
5 who is ex officio.

6 In other words, because he is the Prime
7 Minister of the Palestinian Authority he gets to
8 be the Chairman of the Board of the IPF, but also
9 of a great many other organizations also.

10 So the fact that -- the fact that he may
11 have been a signatory on the account, he wears
12 many hats, he is part of many entities beginning
13 with Palestinian this or that, it proves nothing.

14 It is a spurious thing that Mr. Kerr
15 keeps repeating as if it has significance.

16 What was fully briefed in the summary
17 judgement motion or what was demonstrated with
18 the exhibits is that there were two parallel
19 series of board meetings, there were two parallel
20 series of minutes, there were two parallel
21 boards, and what was called the PPF is something
22 separate that had a completely different life
23 from what's called the IPF.

24 And, frankly, what Mr. Kerr told you
25 about a while ago, that they came to New York to
26 see about this money, yeah, if you read their own

Proceedings

minutes, a guy was dispatched to come to New York to see about trying to get that money.

They didn't have it and they didn't control it, they were trying to get it, and they never actually got it.

We have no qualms with the idea that the IPF believes on some moral level that these assets should go to them. But that's like saying that I believe that computer should be mine. It doesn't make it mine. It is something I might want --

THE COURT: These are all trial issues, not issues to be argued now.

MR. TOLCHIN: Sure. I see what's going on. Every time we talk about what seems to be a scheduling matter, Mr. Kerr keeps underscoring his themes because he thinks it will take hold.

THE COURT: No, no, that's not the case. My only question about choice of law would be -- I feel if that's going to be a real issue I need some briefing on it.

MR. KERR: Your Honor, that's fine. We had originally suggested we could do that in connection with the same time in doing the motions in limine, we can do that beforehand,

Proceedings

your Honor.

THE COURT: I would prefer it beforehand because that is an issue.

MR. KERR: Your Honor, going back to the timing of things.

Mr. Tolchin has indicated this morning, he suggested that in light of the burden of proof issue, that we agreed to do an expedited appeal. We've entered into a stipulation to do that.

If your Honor will so order that.

THE COURT: That's fine. I can't tell the Appellate Division to expedite anything.

MR. KERR: I understand that.

Could I bring something up, your Honor?

THE COURT: Yes, you may.

MR. KERR: Your Honor, just so we're clear, what this stipulation would do would be to -- this is Mr. Tolchin's request -- to stay the trial date pending the resolution of that appeal.

THE COURT: Of those matters.

MR. TOLCHIN: Let's be fair. I like to get along and I think we can get along. We have had a dialogue.

Mr. Kerr seems -- they wanted to stay

Proceedings

the trial because of a jury issue, they wanted to stay the trial because it is the money that's accumulating in Israel.

I thought it would be good to make sure that we had a ruling on the burden of proof issue. I'm a little taken aback by the "At Mr. Tolchin's request."

THE COURT: Do you want this or not?

MR. TOLCHIN: I want it.

MR. KERR: May I hand this up?

MR. TOLCHIN: It is mutual, it is neutral, and I think it is fair to both sides.

THE COURT: So we don't have to discuss it.

MR. KERR: Can I bring it up, your Honor?

THE COURT: Yes. Okay.

MR. KERR: Your Honor, if I may, in light of this, that we're going to do this appeal, I think we're going to have to have another conference when the timing gets a little --

THE COURT: First of all, I'd like to find out when the jury issue gets determined. That's been perfected and argued.

Proceedings

MR. KERR: It was argued on March 3 of this earlier year.

MR. TOLCHIN: I think your Honor should be aware that if we perfect the appeal, as we've stipulated, it will be heard for -- the way the timing worked out, it will be on for I'm not sure which term, but one of the terms of the Appellate Division --

THE COURT: I would assume February, March, April.

MR. KERR: It may be February, your Honor.

MR. TOLCHIN: It is not like you perfect something in June where you are not going to get a decision until the fall. We're early enough in the year that it shouldn't be too long.

MR. KERR: Your Honor, may I suggest this?

We'll report to the Court as soon as we hear from the Appellate Division on the jury issue. We will -- I assume Mr. Tolchin will proceed with his appeal on the burden of proof issue.

What I would suggest on the choice of law issues, perhaps the parties discuss an

Proceedings

appropriate time to brief them.

Would your Honor prefer to have it in a motion or --

THE COURT: I would prefer a motion. It seems to me that Mr. Tolchin does not believe there is an issue as to choice of law, so I believe the ball is in your court.

He believes it is New York, the rest is here.

Am I correct?

MR. TOLCHIN: Correct.

MR. KERR: That's fine.

THE COURT: So it is your motion.

MR. KERR: That's fine, your Honor, we'll make it.

I just need to look at scheduling as to when to do it, but we'll make it with good speed.

THE COURT: You can make it whenever you make it.

MR. KERR: That's fine, your Honor.

I think that's all I have, your Honor.

THE COURT: Okay.

Is there anything you want to raise, Mr. Tolchin, before we close?

MR. TOLCHIN: Not at this time, Judge.

LEE RUTHEN - OFFICIAL COURT REPORTER

Proceedings

THE COURT: Off the record.

(Off the record discussion).

(Whereupon, the case was concluded and
the record was closed)

* * *

C E R T I F I C A T I O N

CERTIFIED TO BE A TRUE AND ACCURATE
TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES
TAKEN OF THIS PROCEEDING.



LEE RUTHEN
Official Court Reporter